No. 80-1232

In the Supreme Court of the United States

OCTOBER TERM, 1980

THILL SECURITIES CORPORATION, ET AL., PETITIONERS

v.

THE NEW YORK STOCK EXCHANGE, INC., AND SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly held that the anti-rebate provision of the New York Stock Exchange's former rule fixing minimum commission rates must be accorded antitrust immunity in order to avoid undue interference with the operation of the Securities Exchange Act of 1934.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 633 F. 2d 65. The opinion of the district court (Pet. App. 15-26) is reported at 473 F. Supp. 1364. The earlier opinion of the court of appeals (Pet. App. 27-55) is reported at 433 F. 2d 264.

JURISDICTION

The judgment of the court of appeals (Pet. App. 56-57) was entered on October 20, 1980. The petition for a writ of certiorari was filed on January 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action for treble damages and for injunctive and declaratory relief brought pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. 15. The action was filed in the United States District Court for the Eastern District of Wisconsin by petitioner Thill Securities Corporation ("Thill") against respondent New York Stock Exchange, Inc. ("NYSE"). The complaint, filed on behalf of Thill and all securities brokers and dealers similarly situated,[1] challenged a NYSE rule mandating fixed minimum commission rates that also prohibited the rebate by a NYSE member to a nonmember of any portion of the commission charged for the execution of a securities transaction for the nonmember on the NYSE.[2]

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[1]The members of the plaintiff class are securities brokers and dealers who are not members of the NYSE.

[2]At the time of the institution of this action in 1963, Article XV, Section 1 of the NYSE Constitution, which established a fixed commission rate system, provided (emphasis supplied):

> Commissions shall be charged and collected upon the execution of all orders for the purchase or sale for the account of members or allied members or of parties not members or allied members of the Exchange, of securities admitted to dealing upon the Exchange

In August 1969, the district court granted summary judgment in favor of respondent NYSE on the ground that its anti-rebate rule was an integral part of the fixing of commissions, that the Securities and Exchange Commission (the "Commission") exercised supervisory power over the fixed commission rate structure of the NYSE, and that the rule was therefore exempt from the application of the antitrust laws. *Thill Securities Corp.* v. *New York Stock Exchange*, [1969] Trade Cas. para. 72,911 at 87,490 (E.D. Wis. 1969). The court of appeals subsequently reversed and remanded, holding that there were triable issues of fact concerning the extent to which the anti-rebate rule was subject to actual review by the Commission and whether the rule was necessary to make the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (the "Act"), work. (Pet. App. 27-55).[3]

Following a trial on the merits, the district court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted (Pet. App. 15-26). The

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and these commissions shall be at rates not less than the rates in this Article prescribed; and *shall be net and free from any rebate*, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect * * *.

In 1972, the NYSE Constitution was amended by the addition of a new paragraph 2(h) to Section 2 of Article XV (Pet. App. 58-59). Paragraph 2(h) and implementing NYSE Rule 385 (Pet. App. 60-63) established a schedule of commissions chargeable to non-NYSE member broker-dealers that provided for a maximum 40% discount from the fixed commissions chargeable to public customers.

[3]Following remand, the Commission and the Department of Justice intervened in this action at the invitation of the court of appeals in order to participate in the trial in the district court. The Department of Justice filed a complaint for injunctive relief in the district court, but subsequently agreed to a dismissal of its complaint in light of this Court's decision in *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975). See Pet. App. 4-5. The Commission remained a party to this action.

district court found that the anti-rebate rule was an integral part of the fixed commission rate structure. It also found that the rule was subject to review, and was in fact reviewed, by the Commission. Accordingly, the court held that, under this Court's decision in *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), antitrust immunity with respect to the anti-rebate rule must be implied in order to avoid undue interference with the operation of the Securities Exchange Act.

The court of appeals affirmed (Pet. App. 1-14). The court agreed that the anti-rebate rule was an integral part of the fixed rate system subject to Commission oversight (*id.* at 10) and held that this Court's decision in *Gordon* therefore precluded antitrust liability (*id.* at 11).

ARGUMENT

The decision of the court of appeals is consistent with principles previously enunciated by this Court in *Gordon* v. *New York Stock Exchange*, *supra*, and does not conflict with the decision of any other court. Further review therefore is unwarranted.

1. Petitioners argue (Pet. 7-22) that the court of appeals should not have recognized an implied immunity that shelters the NYSE's anti-rebate rule from antitrust scrutiny. That question, however, has no continuing importance due to recent changes in the regulatory environment. The NYSE's fixed commission rate system was eliminated in 1975 pursuant to the Commission's adoption of Rule 19b-3, 17 C.F.R. 240.19b-3.[4] The conduct challenged in this case

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[4]Moreover, in the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, Congress amended the Securities Exchange Act of 1934 to prohibit any exchange from fixing commissions to be charged by its members, except upon specified and detailed findings made by the Commission. See Section 6(e) of the Act, 15 U.S.C. 78f(e).

therefore has ceased, and no one other than petitioners will be affected by the outcome of this litigation.

2. In any event, the court of appeals correctly held that this Court's decision in *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), is controlling. *Gordon* involved a broad challenge to the NYSE's entire fixed commission rate system. The case at bar concerns an integral part of that system—a ban on the rebate of any portion of the fixed commission to any person who was not a NYSE member. Thus, the present case requires only the application of settled principles of law to a set of facts almost identical to that which confronted this Court in *Gordon*.

This Court held in *Gordon* that, because the fixing of commission rates was subject to the Commission's regulatory authority and was in fact reviewed by the Commission, the antitrust laws must give way in order to permit the Securities Exchange Act of 1934 to operate as intended by Congress. 422 U.S. at 690-691. As the court below recognized (Pet. App. 2), there is a close relationship between the anti-rebate rule at issue in this litigation and the NYSE rule immunized in *Gordon*: "The [anti-rebate] rule actually was a part of the Exchange's rule which, prior to its repeal, fixed all commissions charged on the floor of the Exchange."[5] Moreover, the court found (*id.* at 10) that it is "clear that the anti-rebate rule was an integral part of the entire fixed-commission rate system."[6] Because the record in this case

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[5]See also Pet. App. 10: "The [anti-rebate] rule in fact is simply [made up of] descriptive clauses in the very Exchange rule providing for the fixed rates."

[6]The rule was not only "implicitly subject to SEC review and approval each time the Commission reviewed the Exchange's proposed rate increases between 1934 and 1968, but it was also specifically discussed by the SEC in its 'Report of Special Study of Securities Markets' * * * issued prior to the initiation of this lawsuit * * *." *Ibid.* See also Pet. App. 24-26.

establishes that the anti-rebate rule "was consistently treated by the SEC as a component of the fixed commission rate system" and that the Commission "fully exercised its statutory jurisdiction to review the rule as an integral part of the rate structure," the court of appeals correctly held that the rule must be accorded antitrust immunity in order to avoid the "obvious interference separate private antitrust actions would cause" (Pet. App. 11).[7]

We recognize that this Court in *Gordon* noted three possible distinctions between that case and the present case in its pre-trial posture. This Court explained that (1) no evidence had been presented to the district court in *Thill* concerning the extent of Commission review of the anti-rebate rule; (2) former Section 19(b) of the Act, 15 U.S.C. (1970 ed.) 78s(b), made no explicit reference to the prohibition of rebates, although such a prohibition "might reasonably be thought to be related to the fixing of commission rates" that Section 19(b) did encompass; and (3) the NYSE's anti-rebate rule "may" have been applied in a discriminatory manner. *Gordon* v. *New York Stock Exchange, supra*, 422 U.S. at 687.

Following a trial on the merits, however, the court of appeals correctly held that there was no longer any basis for distinguishing this case from *Gordon*. As previously noted,

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[7]The court of appeals' decision not only is consistent with this Court's analysis and holding in *Gordon*, but also is supported by the result reached in another case challenging the anti-rebate rule. In *Abbott Securities Corp.* v. *New York Stock Exchange*, 384 F. Supp. 668 (D.D.C. 1974), aff'd, 569 F. 2d 159 (D.C. Cir. 1977), nonmember broker-dealers brought an antitrust suit against, *inter alia*, the anti-rebate rule, alleging an unlawful denial by the NYSE of "economic access" to its market. Because "the issue of economic access [including a prohibition against rebates] for nonmember broker-dealers is inextricably intertwined with the practice of fixing commission rates," the district court held the NYSE immune from the operation of the antitrust laws. 384 F. Supp. at 670. See also *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 734-735 (1975).

the court of appeals affirmed the district court's finding that the anti-rebate rule was an integral part of the fixing of commission rates and thus was subject to the Commission's regulatory authority under former Section 19(b) of the Act. It also determined that the Commission, at all times relevant to this suit, exercised regulatory authority over the anti-rebate rule.[8] The court of appeals finally determined (Pet. App. 12-13) that petitioners' "discrimination" arguments in reality constituted only an attack upon the substantive terms of the anti-rebate rule, not its manner of implementation by the NYSE.[9]

3. Petitioners' remaining arguments (Pet. 8, 12, 16) are without merit because they impermissibly seek to challenge the wisdom or factual necessity for the NYSE's anti-rebate

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> [W]e have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws * * *. [M]aintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards.

[8]Petitioners' contention (Pet. ii) that the Commission never mandated the anti-rebate rule is not dispositive of the issue of antitrust immunity in this case. In *Gordon*, this Court noted that, in view of the language of the Securities Exchange Act of 1934, the active SEC regulation of commission rates, and congressional review and approval of the SEC's actions, those actions should be viewed as the "equivalent" of an agency mandate. 422 U.S. at 689 n.13.

[9]Petitioners argue (Pet. 19) that the rule was discriminatory because commission discounts to nonmember broker-dealers were completely barred prior to 1972 and were thereafter limited to a 40% discount. See note 2, *supra*. Petitioners also contend (Pet. 19-20) that the rule had a discriminatory impact because certain nonmembers were able to obtain reciprocal business on regional exchanges from NYSE members. However, the court of appeals found (Pet. App. 13 n.9) that petitioners "presented inadequate evidence that the rule was ever applied in a discriminatory manner."

rule. This Court emphasized in *Gordon* that such arguments are irrelevant to a determination of whether a rule of a national securities exchange is immune from application of the antitrust laws.[10] As this Court explained with respect to the court of appeals' 1970 decision in this action: "To the extent that the Court of Appeals in *Thill* viewed the question of implied repeal as a question of fact, *concerning whether the particular rule itself is necessary to make the Act work*, we decline to follow that lead." *Gordon* v. *New York Stock Exchange*, *supra*, 422 U.S. at 687 (emphasis supplied).[11] And, in rejecting arguments disputing the "necessity" for fixed rates, this Court stated in *Gordon*:

> On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a

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[10]Petitioners' citation (Pet. 22) to *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), for the proposition that there is no longer any danger of possible conflict between the Commission and the courts, and thus no continuing justification for antitrust immunity, is inapposite. As this Court noted in *Gordon*, its decision in *Ricci* was based upon deference to the expertise of a regulatory agency in determining whether the activities complained of violated the relevant statute and rules thereunder; this Court did not reach the question whether antitrust immunity should be implied in *Ricci*. See *Gordon* v. *New York Stock Exchange*, *supra*, 422 U.S. at 688.

[11]The court of appeals, in its 1970 decision, held that "before a court may abdicate its jurisdiction on the antitrust issue the defendant must establish its anticompetitive conduct as justified because it is necessary for the operation of the Securities [Exchange] Act." (Pet. App. 44).

> matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress.

422 U.S. at 688.

In light of *Gordon*, petitioners' attempts to second-guess the wisdom of the NYSE's policy choices are not relevant to the issue of antitrust immunity in this case.[12] As this Court emphasized in *Gordon*: "The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity." *Gordon* v. *New York Stock Exchange, supra*, 422 U.S. at 688.

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[12]Petitioners contend (Pet. 11-12) that barring nonmemoer broker-dealers from sharing in commissions on securities transactions executed on the NYSE was unnecessary to a fixed commission rate system because (i) other exchanges allowed commission discounts to nonmembers while maintaining fixed rates to the public, and (ii) the NYSE itself adopted, in 1972, a nonmember commission discount. Petitioners also argue (Pet. 12) that, rather than imposing fixed rates on nonmembers as well as on members of the public, the NYSE could have permitted its members to negotiate discounts for nonmember broker-dealers while preserving a fixed commission rate schedule for transactions for public investors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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